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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Appellant,

v.

EVA UWANAWICH,

Defendant and Respondent.

G055319

(Super. Ct. No. 16CF0939)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Tony Rackauckas, District Attorney, and George Turner, Deputy District Attorney, for Plaintiff and Appellant.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Respondent.

Respondent Eva Uwanawich was charged with abducting her daughter Mariah from her father Joshua. At the preliminary hearing, Eva attempted to elicit evidence Joshua had been physically abusing her before she fled with Mariah. However, the court ruled that evidence was largely irrelevant because Eva failed to establish the foundational requirements for invoking an affirmative defense based on domestic violence. Eva does not dispute she failed to prove those requirements. However, she contends her proffered evidence was relevant to negate malice, an element of the charged offense. Therefore, by refusing to let her explore the issue of domestic violence, the court rendered her preliminary hearing fundamentally unfair. We agree. Finding this refusal violated Eva's substantial rights, we conclude she was erroneously ordered to stand trial for unlawfully abducting her daughter.

FACTS

Basic Underlying Facts and Claims

Eva and Joshua are gypsies.¹ They were never legally married, but they did have a gypsy wedding to commemorate their commitment to each other. Following Mariah's birth in 2007, they lived together in New Mexico with Joshua's mother and other members of his family. However, in 2009, Eva moved to Orange County, where she had family. She lived there on her own until Joshua and Mariah joined her in the fall of 2010.

Their reunion was short-lived. In April 2012, Eva fled the family home with Mariah in the middle of the night while Joshua was sleeping. Although this fact is undisputed, the evidence conflicted at the preliminary hearing as to what transpired between Eva and Joshua after that point.

¹ We realize there are quarters in which this term is considered incorrect, quarters where "Roma" or other terms are preferred. But this is the term Eva and Joshua prefer. We will refer to everyone in the family by their first name. No disrespect is intended.

Joshua said he did not know where Eva took Mariah. He called the police, hired a private investigator and spoke to several members of Eva's family, but he was unable to find out where Eva and Mariah were living. He filed a custody action in California that never got off the ground because he was unable to serve Eva. After looking for her in several states, he contacted the Orange County District Attorney's Office in 2014. Two years later, in the spring of 2016, Eva was arrested in South Carolina and extradited to California to face child abduction charges. That period marked the first time in roughly four years Joshua had been able to see his daughter.

Joshua testified he had very little contact with Eva during that four-year period. And the few times he spoke with her on the phone, she refused to reveal where she and Mariah were living.² So, even though appellant wanted to see Mariah during this time, he was unable to do so.

Eva painted a very different picture of events. She testified that when she left California with Mariah in 2012, they flew to South Carolina and moved in with her mother. Upon arriving in South Carolina, she had her mother call Joshua to let him know where they were living and that Mariah was alright. She said she also explained all that to Joshua in a letter and kept in contact with him by phone. While she had no interest in reconciling with Joshua, she made it clear to him that she was not going to stop him from having a relationship with Mariah. In fact, she invited him to come visit Eva, but he showed no interest in doing so.

Eva testified she lived an open life in South Carolina. Not only did she work, obtain a driver's license and enroll Mariah in school, she also informed the DMV

² Joshua described two such conversations, the first of which occurred on Father's Day 2012. During that call, Eva let him speak to Mariah on the phone, but when Mariah made a reference to her going to a beach in California, Eva grabbed the phone, said "I'm in control," and hung up. The second conversation took place in 2013 at the behest of gypsy elders, but Eva was obstinate during the call and offered no clues regarding her whereabouts. Also, in 2015, Joshua sent Eva a message on her Instagram account asking if he could speak with Mariah. Eva replied "ha, ha, ha. After all this time and you're still looking for us."

of her new address when she and Mariah moved out of her mother's house to another location in South Carolina. At no point did she change her name or appearance or try to conceal Mariah from Joshua.

Charges and Statutory Framework

Despite Eva's claims, the prosecution charged her with child abduction under Penal Code section 278.5.³ The period of abduction was alleged to be between April 18, 2012 and March 15, 2016, which is the time from which Eva left California with Mariah to the time she was arrested in South Carolina.

Section 278.5 provides, "Every person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation," is guilty of a crime punishable by up to three years in prison. (§ 278.5, subd. (a).) However, pursuant to an affirmative defense codified in section 278.7, section 278.5 does not apply if the person who takes the child has been a victim of domestic violence and has a "good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm[.]" (§ 278.7, subd. (b).) In this context, emotional harm is broadly defined to include "having a parent who has committed domestic violence against the parent who is taking, enticing away, keeping, withholding, or concealing the child." (*Ibid.*)

This affirmative defense is itself subject to specific conditions, however. In order to invoke the good faith defense in section 278.7, the defendant must prove that, within a reasonable time of taking the child, he or she 1) made a report to the district attorney of the county where the child previously resided, and 2) filed a custody proceeding in a court of competent jurisdiction. (§ 278.7, subd. (c); *People v. Mehaisin* (2002) 101 Cal.App.4th 958, 965.) This statutory scheme was enacted to encourage

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Unless noted otherwise, all further statutory references are to the Penal Code.

parents to seek legal redress when custody issues arise, “and to discourage them from taking the law into their own hands by concealing the child in a place unknown to the other parent.” (*People v. Lortz* (1982) 137 Cal.App.3d 363, 368.)

Evidence of Physical Abuse

At Eva’s preliminary hearing, there was plenty of discussion regarding the application of these rules. The issue of domestic violence was first broached by defense counsel during her cross-examination of Joshua, when she asked him “isn’t it true that [Eva] left New Mexico [in 2009] because you were hitting her?” In objecting to this question, the prosecutor argued any evidence of domestic abuse between Joshua and Eva was irrelevant because there had been no showing that Eva made a report to the district attorney or filed a custody action after leaving California with Mariah. Defense counsel contended that didn’t matter because the subject of domestic abuse was relevant to the issue of malice, an element of the charged offense, but the court disagreed. It did not believe the subject was relevant absent evidence Eva had complied with the reporting and custody proceeding requirements. Therefore, it prohibited defense counsel from asking Joshua any questions about domestic violence until such evidence was produced.

When cross-examination resumed, defense counsel asked Joshua why he believed Eva left him in 2009 when she went to California. Joshua surmised Eva did not like living in New Mexico and wanted to be closer to her family in Orange County. He also suggested Eva had the need to travel because she grew up in an unstable household. At that point, defense counsel asked Joshua about a photograph he sent Eva in 2009. On the back of the photograph, Joshua wrote a prayer saying he was sorry for hitting Eva and would never lay a hand on her again if Jesus would bring her back to him. The prosecutor objected to this evidence, but the court allowed it to impeach Joshua.

On redirect, the prosecutor asked Joshua about the prayer. He said he wrote it because he had heard from Eva’s family that one of the complaints she had about him

was that he was violent. Asked if he had any recollection of being violent toward Eva, Joshua admitted he once threw a doll at her when Mariah was a baby. However, he said he did so merely to get Eva's attention, not to hurt her. He also suggested Eva overreacted to the situation.

On recross-examination, defense counsel asked Joshua whether the doll-throwing incident was the only time he had ever done anything violent to Eva. After a long pause, Joshua said, "I'm going to say yes." Defense counsel then tried to ask Joshua additional questions about this subject and the prayer he wrote to Eva, but the prosecutor objected, and the court precluded this line of inquiry. It felt the prayer evidence was relevant to impeach Joshua's testimony about why Eva may have left him, but it was not germane to any other issue in the case.

Eva then took the stand and gave her version of the doll-throwing incident. She said Joshua not only threw a doll at her that day, he also violently kicked her, bruising her stomach and legs. She also said the incident is what prompted her to leave Joshua in 2009. When asked if there were any other reasons, the prosecutor objected, claiming it was irrelevant how Eva felt about Joshua in 2009, because that was three years before she fled with Mariah. Defense counsel insisted she was just trying to give the court a complete picture of Eva's relationship with Joshua, but she then moved on to another line of questioning.

Shortly thereafter, the subject of domestic abuse resurfaced yet again. When asked by her attorney why she waited four months before personally contacting Joshua after moving to South Carolina with Mariah, Eva answered: "I didn't want to talk to him. I was very hurt . . . [¶] . . . [¶] because of the way that he had been treating me as far as hitting me and choking me."

Again, the prosecutor objected to this evidence for lack of proof that Eva had complied with the notice and custody proceeding requirements for asserting a

domestic violence defense. This time, however, the court gave defense counsel a little leeway; it overruled the objection on the condition the defense could prove those requirements were met. Defense counsel then asked Eva about the period in April 2012 when she left Joshua and fled to South Carolina with Mariah. Eva said that before she left Orange County, she notified the Los Alamitos Police Department, as well as a shelter for battered women. Asked why she did this, Eva said she was in a panic and needed to get away from her “abusive and violent home.” She said the shelter actually offered her a place to stay, but she was afraid to go there because it was near Joshua’s parents’ home. She also contacted various private attorneys in California and South Carolina. Eva testified that none of the people she spoke to told her it was illegal for her to flee with Mariah. However, she admitted she never contacted the district attorney’s office or filed a custody action in any court.

Based on that admission, the prosecutor moved to strike Eva’s testimony about domestic violence between her and Joshua. In opposing the motion, defense counsel argued Eva was in substantial compliance with the notice and custody proceeding requirements because the police department is an extension of the district attorney’s office, but the court disagreed and granted the motion to strike. While saying it would consider Eva’s testimony for the limited purpose of showing what she did when she left California, the court ruled her testimony about domestic abuse was not otherwise relevant. Therefore, it refused to consider her testimony for purposes of establishing an affirmative defense or negating an element of the charged offense. Having decided the domestic violence evidence was largely immaterial, the court then assessed the remaining evidence and determined it was sufficient to hold Eva over for trial on the charge of child abduction.

Motion and Writ Proceedings

Eva filed a section 995 motion to dismiss for lack of evidence Joshua was Mariah's legal custodian or that she acted with malice in fleeing California with Mariah. She also argued that by not allowing her to question Joshua about domestic abuse and not allowing her to testify about that subject, the court infringed her rights to cross-examination, present a defense, and due process of law. In addition, Eva filed a nonstatutory motion to dismiss on the grounds the prosecution failed to provide her with exculpatory discovery, and her attorney was ineffective in various respects. After hearing extensive argument on these issues, the trial court denied Eva's motions.

Eva then filed a petition for mandate in this court. We issued an alternative writ directing the trial court to either grant the section 995 motion or show cause why it should not be granted. The trial court chose the former option and dismissed the case. The People timely appealed that decision.

DISCUSSION

Was Joshua a Victim Under Section 278.5?

As set forth above, section 278.5 makes it a crime to maliciously deprive a lawful custodian of his or her right to custody of a child. (§ 278.5, subd. (a).) At the preliminary hearing, Eva never disputed Joshua was Mariah's father and helped care for her when she was born. However, based on the fact she and Joshua were never married, and there is no custody order between them, Eva contends Joshua did not have a legal right to custody of Mariah so as to qualify him as a victim under the statute. We disagree.⁴

⁴ The People contend Eva forfeited her right to raise this issue on appeal because, even though she raised it in her section 995 motion, she did not to do so at the preliminary hearing. However, in challenging whether Joshua qualified as a victim under section 278.5, Eva is effectively challenging the sufficiency of the evidence to support an essential element of the charged offense. Because "issues of sufficiency of the evidence are never waived" (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1122), the People's forfeiture argument fails.

As used in section 278.5, the term “lawful custodian” includes any person who has the “right to custody” of a child. (§ 277, subd. (d).) The term “right to custody” means “the right to the physical care, custody and control of a child pursuant to a custody order . . . , or, in the absence of a court order, by operation of law, or pursuant to the Uniform Parentage Act contained in Part 3 (commencing with Section 7600) of Division 12 of the Family Code.” (§ 277, subd. (e).)

Pursuant to Family Code section 7611, a man is presumed to be the natural father of a child if he receives the child into his home and openly holds out the child as his own. (Fam. Code, § 7611, subd. (d).) If those criteria are met, the man is entitled to equal custody with the child’s mother. (Fam. Code, § 3010, subd. (a).)

Here, the record shows that while Joshua and Eva were never legally married, they did have a gypsy wedding and were living together as de facto husband and wife when Mariah was born. Joshua also helped care for Mariah and treated her like she was his daughter. It appears he held her out as his own when the family lived in New Mexico and when they were together in California. Thus, despite the absence of a court order, Joshua had a right to custody over Mariah for purposes of section 278.5, and he was properly named as a victim of Eva’s alleged offense. (*People v. Moses* (1996) 43 Cal.App.4th 462, 468-469 and fn. 5.)⁵

Was There Sufficient Evidence of Malice?

The parties also dispute whether there was sufficient evidence Eva “maliciously” deprived Joshua of custody over Mariah within the meaning of section 278.5. Under the deferential standard of review applicable to preliminary hearing proceedings, the answer to that question is plainly yes.

⁵ In arguing otherwise, Eva relies on *Cline v. Superior Court* (1982) 135 Cal.App.3d 943, *People v. Johnson* (1984) 151 Cal.App.3d 1021, *People v. Howard* (1984) 36 Cal.3d 852 and *Barber v. Superior Court* (1991) 1 Cal.App.4th 793. However, these cases are inapt because they involved earlier versions of section 278.5 that required the existence of a court order. (See *People v. Neidinger* (2006) 40 Cal.4th 67, 78-79 (*Neidinger*) [explaining that while the terms of section 278.5 once required a custody order, the statute no longer does so].)

The purpose of a preliminary hearing is to establish whether there is probable cause to believe the defendant has committed a felony. (§ 866, subd. (b).) ““Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.”” [Citations.]” (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.) In determining whether this standard has been met, we view the evidence in favor of the prosecution. (*Ibid.*) We do not attempt to reconcile evidentiary conflicts or judge the credibility of witnesses. (*People v. Barba* (2012) 211 Cal.App.4th 214, 227.)

Malice has been described as “an amorphous legal concept, easier to recognize than to articulate.” (*People v. Summers* (1983) 147 Cal.App.3d 180, 187.) However, in the context of section 287.5, the concept of malice has been assigned a particular meaning. In analyzing that section in *Neidinger, supra*, our Supreme Court incorporated the definition of malice from the Penal Code, which defines malice in the disjunctive to include “a wish to vex, annoy, or injure another person, *or* an intent to do a wrongful act, established either by proof or presumption of law.” (§ 7, subd. 4, italics added; see *Neidinger, supra*, 40 Cal.4th at p. 79.) This definition describes two types of malice, malice in fact and malice in law. (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1159 (*Jo*)). However, neither definition can operate to “‘transform an offense into a specific intent crime.’ ““Rather, the requirement of malice functions to ensure that the proscribed conduct was ‘a deliberate and intentional act, as distinguished from an accidental or unintentional’ one.”” [Citation.]” (*Ibid.*)

At the preliminary hearing, there was no evidence indicating Eva acted by mistake or accident in this case. One could argue whether she acted with ill will toward Joshua or had the intent to vex or annoy him, but she clearly knew what she was doing when she took Mariah from Joshua and fled across the country with her, which satisfies the intentionality component of malice in law. While Eva claims she gave Joshua ample

opportunity to keep in contact with and visit Mariah, Joshua testified to the contrary, and even if Eva's claim were true, it would not have any bearing on whether she acted intentionally in fleeing the state with Mariah. Viewing the record as a whole and in favor of the prosecution, there was probable cause Eva acted with malice in that she intended to do a wrongful act. We see no reason to disturb that finding.

Was Eva Denied a Substantial Right at the Preliminary Hearing?

Even though there was ample evidence she acted with malice, Eva contends she is entitled to a dismissal because the court largely precluded her from eliciting evidence on the subject of domestic abuse. Eva contends this evidence was admissible to show she lacked malice in fleeing with Mariah to South Carolina, and therefore it was pivotal to defend against the charge of child abduction. We agree with Eva that the court took an unduly restrictive approach to the domestic violence evidence and that this resulted in a violation of her substantial rights.

As we have explained, the People's burden of proof at a preliminary hearing is not heavy. Nonetheless, a defendant retains several "substantial rights" at this stage of the case. (*Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074, 1084.) These include the right of cross-examination, the right to present evidence to negate an element of the charged offense, and the right to impeach adverse witnesses. (§ 866, subd. (a); *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 875, 880.) These protections help weed out groundless charges and ensure the defendant is not detained for an alleged crime that was never actually committed. (*People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 835.) "An information, of course, will not be set aside merely because there has been some irregularity or minor error in procedure in the preliminary examination. [Citation.] But where it appears that, during the course of the preliminary examination, the defendant has been denied a substantial right, the commitment is

unlawful within the meaning of section 995, and it must be set aside upon timely motion. [Citations.]” (*People v. Elliot* (1960) 54 Cal.2d 498, 502-503.)

The People argue there was no violation of Eva’s substantial rights because the court did not meaningfully restrict her ability to elicit testimony about the issue of domestic violence. In so arguing, the People point to the fact Eva was allowed to cross-examine Joshua about the doll-throwing incident, and she herself testified that Joshua was physically abusive toward her. However, the court admitted the doll-throwing evidence for the limited purpose of impeaching Joshua’s testimony about why he believed Eva left him in California. And, except to show *what* she did when she fled California with Mariah, the court excluded Eva’s testimony about domestic violence. It is clear the court neither admitted, nor considered, this evidence to show *why* Eva left California, which is the primary purpose for which it was offered.

Still, because Eva failed to comply with the reporting and custody proceeding requirements when she fled California (a fact she does not dispute) the People claim the evidence of domestic abuse was irrelevant to the issue of whether she violated section 278.5. This claim is also incorrect. Evidence of domestic violence is admissible for two distinct purposes in a prosecution under section 278.5. Primarily, it can be used as an affirmative defense, if the reporting and custody proceeding requirements set forth in section 278.7 are satisfied. (*Jo, supra*, 15 Cal.App.5th at p. 1168.) But even if those requirements are not met, evidence of domestic violence is admissible to negate malice, which is a necessary element under section 278.5. (*Id.* at pp. 1169-1170.) More particularly, such evidence is admissible to negate malice in fact, which requires proof the defendant acted to vex, annoy or injure the victim. (*Ibid.*) Thus, the court erred in not allowing Eva to introduce evidence of domestic violence for this purpose.

The district attorney argues that any such error would be harmless since it would negate malice in fact, but not malice in law. He contends the latter requires only

proof that the “defendant intentionally deprived [the victim] of a right to custody or visitation [.]” (*Jo, supra*, 15 Cal.App.5th at p. 1169.)

It’s a good argument. As we have noted, errors or irregularities at the preliminary hearing will not suffice to warrant a dismissal of the charges unless they deny the defendant a substantial right. Eva could be deemed to have been denied a substantial right affecting the legality of her commitment only if she has been subjected to “prejudicial error, that is, error that reasonably might have affected the outcome” of the hearing. (*People v. Konow* (2004) 32 Cal.4th 995, 1024; accord, *Avitia v. Superior Court* (Dec. 24, 2018, S242030) ___ Cal.5th ___; *People v. Standish* (2006) 38 Cal.4th 858, 882-883; *Jennings v. Superior Court, supra*, 66 Cal.2d at p. 879.) If, as the prosecution contends, Eva’s evidence would not have negated the malice element of the child abduction offense defined in section 278.5, its exclusion would not have had any impact on the outcome of the preliminary hearing.

We might have adopted this line of reasoning with regard to other offenses. But the analysis of this element of the offense in child abduction cases seems to have been changed by the 1996 amendments to the statutory scheme. As our Supreme Court instructed in *Neidinger*, “The malice requirement and the section 278.7(a) defense are intertwined, not entirely separate. Section 278.7(a) is not entirely collateral to the elements of the offense but relates to the element of malice and thus to the person’s guilt. [Citation.]” (*Neidinger, supra*, 40 Cal.4th at p. 79.)

This being the case, we cannot find the error harmless. The order of the court below is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.